Page

Smith v. State (1937), 212 Ind. 605,609,610, 10 N.E. 2d 899 58

Sparks v. State (1964), ___ Ind. ___, 196 N.E.2d 748 35

State ex rel Macon v. Orange Circuit Court (1964), ___ Ind. ___, 198 N.E. 2d 229..... 31,32,33

State of Indiana v. Jeeter 15,56

State Tax Commission v. Van Cott, 309 U.S.511.... 22

Stephenson v. United States, 211 F. 2d 702 (8th Cir., 1954)..... 55

Sykes v. United States, 205 Fed. 909 (8th Cir.1913) 55

Thompson v. State, 66 N.E. 2d 597, 244 Ind.290.. 58

Trigg v. State (1957), 238 Ind. 260, 262,149 N.E. 2d 545..... 28

United States v. Levi, 177 F. 2d 827 (7th Cir.,1959) 55

United States v. Marzano, 149 F. 2d 923 48

United States v. Telkinson, 297 U.S. 157,160..... 57

Walker v. State (1934), 206 Ind. 232,236, 189 N.E. 127..... 58

Webster v. State (1935), 209 Ind. 274,275, 198 N.E. 781..... 30

Whitney v. State (1934), 206 Ind. 562,570, 188 N.E. 779..... 58

Page

Williams v. United States, 93 F. 2d 685, 66 F. 2d 868,869 49,50

Willinnar v. State (1935), 209 Ind. 264,268, 198 N.E. 799 58

Constitution of the United States, Amendment XIV, Section 1 7,59

Constitution of the United States, Amendment V.... 8

Constitution of the United States, Amendment VI... 8

Indiana Acts, 1905, Ch.169, Sec.282, p.584, (Burns' 9-1903) 8,27

Indiana Acts, 1935, Ch.228, Sec.3, p.1198, (Burns' 9-1633) 11, 12, 13

Indiana Acts, 1935, Ch.189, Sec.1, p.928, (Burns' 9-1133) 13, 14

Indiana Penal Code, Acts 1935, Ch. 288, Sec.3, p. 1198 (Burns' 9-1633) 4, 14

Indiana Penal Code, Acts 1935, Ch. 189, Sec.1, p. 928 (Burn' 9-1133) 5, 14

Indiana Supreme Court Rule 2-6 ..... 10, 11, 18

Indiana Supreme Court Rule 2-40 ..... 11, 18

Title 28, United States Code, Sec. 1257 (3) 2

IN THE SUPREME COURT OF THE UNITED STATES

NO._____

JACK HERMAN,

Petitioner

vs.

STATE OF INDIANA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner respectfully asks this Court to issue a Writ of Certiorari to review the final judgment of the Supreme Court of Indiana which affirmed the judgment of the lower Court finding petitioner guilty of the crime of Bribery and sentencing him to two (2) to fourteen (14) years in the Indiana State Prison.

THE OPINION BELOW

The opinion of the Supreme Court of Indiana is as yet unreported in the Indiana Reporter but reported at____ N.E. 2nd_____. A copy is hereto annexed in Appendix A (infra. p. 63 through p.82). Petition For Rehearing was denied as shown by Appendix B (infra, p.83).

STATEMENT OF JURISDICTION

The decision and judgment of the Indiana Supreme Court was entered September 20. 1965. The petitioner's Petition For Rehearing was filed on October 7, 1965, which was within the twenty days as required by rule and it was overruled on October 19, 1965.

The statutory provision believed to confer upon this Court, jurisdiction to review the judgment in question by Writ of Certiorari is Title 28, United States Code, Section 1257 (3).

QUESTIONS PRESENTED

1. Whether this Court should exercise its jurisdiction to prevent a flagrant and blatant miscarriage of justice where petitioner was effectively denied his constitutional right,

(a) Where the Supreme Court of Indiana has misapprehended the contentions of petitioner and the state of record on the questions presented, by failing to rule on same as presented in the briefs; by failing to fully and completely rule upon and adjudicate the constitutional questions presented and involved therein; where ambiguous or obscure adjudication by the Indiana Supreme Court stand as barriers to a determination by this Court of the validity under the

Federal Constitution of State Action complained of herein; and by refusing to consider manifest and prejudicial error, although admittedly some objections were not timely made at the trial of this cause, because, where, as here, there are unusual circumstances wherein gross miscarriage of justice has resulted thereby.

2. Whether the judgment of conviction herein is in conflict with this Court's prescriptions enunciates in Minnesota v. National Tea Company, 309 U.S. 551, and Jankovich v. Indiana Toll Road Commission, 13 L. ed. 2d 439, 85 S. Ct. (decided January 18, 1965), with reference to unlitigated and unanswered questions and contentions timely and properly raised in the Indiana Supreme Court, and where ambiguous, obscure and indefinite adjudications by said Court stand as a barrier to a determination of the validity under the Federal Constitution of State Action.

3. Whether the judgment of conviction herein is in conflict with Henry v. Mississippi, 85 S. Ct. 564 (1965) and the requirements of Due Process in that the record herein is barren of any evidence to determine whether appellant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his Federal claims in the State Courts, whether for strategic, tactical or any other reasons that can be described as the deliberate by-passing of Indiana State Procedures.

4. Whether the opinion of the Indiana Supreme Court followed the dictates of this Court as enunciated in:

(a) Douglas v. California, 372 U.S. 353, involving appellate opportunities where the record is unclear or the errors are hidden; and where equal protection of the law does not exist if the kind of an appeal a man enjoys

depends on the amount of money he has; and equal protection of the law is lacking where a defendant with funds, appealing as a right from a conviction, enjoys benefit of counsel while an indigent defendant, if he chooses to carry out such an appeal, is handicapped by being forced to run the gantlet of a preliminary showing of merit, thereby disclosing that the right to appeal does not comport with fair procedure.

(b) Griffin v. Illinois, 351 U.S. 12, involving appellate review of criminal convictions where the transcript of the evidence is essential to an appeal sought by indigents; and,

(c) Henry v. Mississippi, 85 S. Ct. 564, 568, (1965), implied waiver wherein the state rule of procedure can be disregarded for the purpose of considering a federal question if the rule serves no rational purpose under the facts of the case, and the failure to meet the rule was manifestly a matter of inadvertence and not a matter of strategy; and,

(d) Griffin v. State of California, 85 S. Ct. 1229 (1965), holding that the Fifth Amendment applies to the states in all its refinements, citing Mallory v. Hogan, 378 U.S. 1, "It would be incongruous to have different standards determine the validity of a claim of privilege**, depending on whether the claim was asserted in a state or federal court."; and,

5. Whether petitioner's federally protected rights prevent Indiana's Penal Code, Acts 1935, Chapter 228, Sec. 3, p. 1198 (Burns' 9-1633) from being applied in the particular manner and the particular circumstances of his case herein.

6. Whether petitioner's federally protected rights

prevent Indiana's Penal Code, Acts 1935, Chapter 189, Sec. 1, p. 928 (Burns' 9-1133) from being applied in the particular manner and the particular circumstances of his case herein.

7. Whether the Indiana Supreme Court should have made a finding and ruling on federal questions involved herein, when, as here, the findings, rulings and decisions that were made were so involved with the federal questions presented that they are in effect determinations of those questions.

8. Whether the process followed in petitioner's cause denied to him, any of his federal rights, even though said rights may not in themselves be capable of being reviewed here on appeal.

9. Whether the criminal appellate procedure of the State of Indiana afforded petitioner equal protection of the law regardless of his financial circumstances.

10. Whether certain evidence used against petitioner at his trial amounted to an unconstitutional deprivation of petitioner's right of confrontation.

11. Whether petitioner was sufficiently advised as to the nature and cause of the accusations against him within the requirements of due process.

12. Whether petitioner had a fair trial:

(a) Where the trial court indulged in acts of advocacy with reference to qualifying an exhibit for admission into evidence, wherein objection had been made but has not been ruled upon where said evidence is hearsay and was the only evidence relied upon by the prosecution?

(b) Where the trial court permitted the amendment of an indictment after a plea of alibi had been timely and properly made and where the sufficiency of the State's answer to a plea of alibi is timely questioned?

(c) Where the trial court admitted, over objection, hearsay evidence of a self-confessed felon and perjurer who had bargained with the prosecutor to testify in exchange for a dismissal of bribery charges pending against him?

(d) Where the trial Court admitted, over objection, highly prejudicial hearsay evidence?

(e) Where his right to a fair trial is deemed to have been waived by the mere omission of his counsel to object to the illegal procedure so as to justify affirmance of the judgment of conviction on review.

(f) The same trial Court, under an identical criminal charge, the same evidence and the same witnesses and the same issues, did so restrict, curtail and limit the scope of inquiry and the method of proof and the evidence of the State so as to render the conviction of a co-defendant more difficult, which forced same Prosecutor to dismiss and/or Nolle Pross identical charges against twenty-two other co-defendants, wherein the proof was no less evident, no more difficult, no less accessible than in the case at bar; and,

(g) The same State's star witness, an exconvict who bargained with the State in exchange for his testimony in the instant trial; who refused to testify before the Grand Jury concerning the alleged participation of twenty-two co-defendants on an identical charge as petitioner, and who, upon application by the Prosecutor to compel said testimony

before the Grand Jury, was permitted to refuse to testify, thus nullifying the opportunity of the State to charge and try said twenty-two co-defendants on identical charges, resulting in a denial of equal protection of the law to petitioner herein; and,

(h) Where the record in the instant cause in petitioner's trial conclusively disclosed the reluctance of the State's lone star witness to testify and reveal overtures of the State to secure certain testimony and where the principle witness attempted to be used by the State invoked the Fifth Amendment, thus forcing the State to rely on hearsay testimony for conviction.

(i) Whether the Court below erred in sustaining the rulings of the trial court in the above particulars, and in affirming the trial Court's ruling in overruling the Motion For New Trial.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States

AMENDMENT XIV, Sec. 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT V:

No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

STATUTES AND USAGES BEING QUESTIONED

Indiana Acts 1905, Ch. 169, Sec. 282, p. 584 (Burns'-1903)

"The court shall grant a new-trial to the defendant for the following causes, or any of them:

First. Irregularity in the proceedings of the court, or

jury, or for any order of the court or abuse of discretion by which the defendant was prevented from having a fair trial.

Second. When the jury has separated without leave of court after returning to deliberate upon the verdict.

Third. When the jury has received and considered any evidence, paper or document not authorized by the Court.

Fourth. When the jury has been guilty of any misconduct tending to prevent a fair and due consideration of the case.

Fifth. When the verdict has been found by means other than a fair expression of opinion on the part of all the jurors.

Sixth. Accident or surprise which ordinary prudence would not have guarded against.

Seventh. Error of law occurring at the trial.

Eighth. Newly discovered evidence, material for the defendant which he could not with reasonable diligence, have discovered and produced at the trial.

Ninth. When the verdict of the jury or the finding of the court is contrary to law or is not sustained by sufficient evidence.

The motion for a new trial and the causes therefor shall be in writing and must be filed within thirty (30) days from the date of the verdict or finding; and any such cause not disclosed in the record shall be sustained by affidavit.

The motion must be filed in open court, if the court be then in session, otherwise it shall be filed with the clerk of the court."

Indiana Supreme Court Rule 2-6

"There shall be attached to the front of the transcript, immediately following the index, a specific assignment of the errors relied upon by the appellant in which each specification of error shall be completely and separately numbered. An appellee may of right and without notice likewise assign cross-errors within thirty (30) days after the filing of the appellant's brief by filing such assignment with the clerk who shall attach the same to the transcript. If two (2) or more parties join in an assignment of errors or cross-errors, it shall be treated as joint and several, unless otherwise indicated.

In the title to the assignment of errors all parties to the judgment seeking relief by the appeal shall be named as appellants, and all parties to the judgment whose interests are adverse to the interests of the appellants shall be named as appellees. Assignment of cross-errors shall use the same title, but immediately thereafter shall designate the parties seeking relief and those against whom relief is sought by assignment of cross-errors. Failure properly to name parties will not be treated as jurisdictional. Amendments may be permitted upon such terms as the court shall direct.

In all cases in which a motion for a new trial is the appropriate procedure preliminary to an appeal, such motion shall be filed and shall separately specify as grounds therefor each error relied upon however and when ever arising up to the time of the filing of such motion, and as assignment of error on appeal to the

effect that the trial court erred in overruling said motion shall be the only means of raising said asserted errors on appeal. In all other cases and in cases of asserted errors arising subsequent to the filing of the motion for a new trial, such asserted errors may be assigned independently. Amended June 28, 1960. Effective September 1, 1960, and shall apply only to cases filed on or after such effective date."

Indiana Supreme Court Rule 2-40 (First Paragraph)

"Hereafter no court shall have jurisdiction to entertain any action for a writ of error coram nobis in any criminal case, but the remedy heretofore granted in such proceeding shall hereafter be obtained solely through a motion for a new trial in the case out of which the cause therefor is alleged to have originated. Each ground shall be separately specified in the motion for a new trial, and any ground or error not so specified shall be considered waived."

Indiana Acts 1935, Ch. 228, Sec. 3, p.1198 (Burns 9-1933)

"Whenever a defendant in a criminal case in a court other than that of a justice of the peace shall propose to offer in his defense evidence of alibi, the defendant shall, not less then ten (10) days before the trial of such cause, file and serve upon the prosecuting attorney in such cause a notice in writing of his intention to offer such defense. The notice shall include specific information in regard to the exact place at which the defendant claims to have been at the time stated in the indictment or affidavit as the time of such offense. The provisions of this statute shall not apply in case the court sets the trial for a date less than fourteen (14) days ahead.

In the defendant's notice, as provided in the next preceding section, the defendant may also expressly require the prosecuting attorney to file and to serve upon the defendant or upon his counsel a specific statement in regard to the exact date which the prosecution proposes to present at the trial as the date when, and the exact place which the prosecution proposes to present at the trial as the place where, the defendant was alleged to have committed or to have participated in the offense. If the defendant's notice requires such statement by the prosecuting attorney, or if the prosecuting attorney proposes to present at the trial as the specific date when the defendant committed or participated in the offense a date other than the date stated in the defendant's notice, the prosecuting attorney shall file and serve such statement upon the defendant or upon his counsel not later than eight (8) days before the trial. If the prosecuting attorney's statement to the defendant names a specific date other than the date which is stated in the indictment or affidavit and in the defendant's notice, the defendant shall not later than four (4) days after the filing of the prosecuting attorney's statement file and serve upon the prosecuting attorney defendant's second notice presenting for such changed date the same details required for the original notice.

In the event of the failure of the defendant to file and to serve the defendant's original notice, as prescribed herein or the defendant's second notice as prescribed herein, the court may in its discretion extend the time for filing the same. At the trial, if it appears that the defendant has failed to file and to serve upon the prosecuting attorney the defendants original notice of alibi as prescribed herein, the court shall, in the absence of a showing of good cause for such failure by the defendant, exclude evidence offered by the defendant to establish an alibi. At the trial, if it appears that the prosecuting attorney has failed to file and

to serve upon the defendant or upon his counsel the prosecuting attorney's statement as prescribed herein, the court shall, in the absence of a showing of good cause for such failure by the defendant to establish that he was at a place other than the place specified in the prosecuting attorney's statement."

Indiana Acts 1935, Ch. 189, Sec. 1, p. 928 (Burns' 9-1133)

"Criminal Procedure--Indictments and Affidavits--Amendment of--When.

Section 1. Be it enacted by the general assembly of the State of Indiana, That the court may at any time before, during or after the trial amend the indictment or affidavit in respect to any defect, imperfection or omission in form, provided no change is made in the name or identity of the defendant or defendants or of the crime sought to be charged."

(It is not being urged that any of the above-quoted statutes of Supreme Court Rules of the State of Indiana are unconstitutional on their face. It is being urged that they are unconstitutional as they have been interpreted by Indiana Supreme Court decisions which are quoted hereafter and that they are unconstitutional as applied to the facts of petitioner's case.)

STATEMENT OF THE CASE

One of the principle questions being presented herein concerns the exercise by this Court of its appellate jurisdiction and power not only to correct errors of law under review but also to make such disposition of the case as justice requires. It is petitioner's contention that the opinion of the

Indiana Supreme Court with reference to the construction, application and interpretation of Burns' Statutes 9-1633, Indiana Acts 1935, Ch. 228, Sec. 3, p. 1198, concerning Alibi, and, Burns' 9-1133, Indiana Acts 1935, Ch. 189, Sec. 1, p. 928, concerning Amendments of Indictments is such obscure and ambiguous adjudication by the Indiana Supreme Court that it stands as a barrier to a determination by this Court of the validity under the Federal Constitution of State Action, and that there is considerable uncertainty as to whether the Indiana Supreme Court relied merely argumentatively upon the Federal Constitution and decisions thereunder in construing provisions of the aforesaid State statutes, that, therefore, the judgment of the Supreme Court of Indiana should be vacated and the cause remanded to the Indiana Supreme Court for further reconsideration. Another question being presented herein concerns the criminal appellate process as it is structured and effectuated under Indiana law. It is the petitioner's contention that he was denied equal protection of the law in his particular case and that the circumstances and rulings which denied petitioner an adequate appellate hearing are, by their nature, so commonplace that the question thus presented is of outstanding social importance.

The petitioner presented a large number of questions upon his appeal to the Indiana Supreme Court; some of these questions were what are commonly recognized as federal questions while others were not. Of the questions presented to the Indiana Supreme Court, some were considered on their merits while others were not. It is petitioner's principal contention that the Indiana Supreme Court's refusal to consider certain state and federal questions on the merits constituted a denial of equal protection because of the particular reasons which the Indiana Supreme Court gave for not so considering them.

In order to present the petitioner's principal contention as well as his subordinate contentions in a contex which will render them cogent and lucid, it is necessary to set out certain matters of record occurring at petitioner's trial and on his appeal which normally would not be pertinent to a petition for certiorari. What follows is not an attempted re-hash of matters which were exclusively within the province of the jury and the state courts. It is necessary to set out these matters in order to demonstrate that the petitioner was denied equal protection of the law by the manner in which the Indiana Supreme Court heard his appeal.

The petitioner, a police officer, was indicted by the Grand Jury of Marion County, Indiana, for the crime of Bribery eleven months after the alleged Bribery was alleged to have occurred. He was indicted together with twenty-one other police officers but the indictments against the others subsequently were dropped for reasons stated hereafter.

It is interesting to note that in the trial of one police officer on a similar charge in a cause entitled, "State of Indiana v. Jeter", in the same court in a trial by jury, the jury returned a verdict of "not guilty" and it is earnestly contended that the action of the trial court in restricting and limiting the state's evidence that was heretofore allowed in petitioner's cause, substantially affected the verdict of the jury. The rulings of the trial court in the instant case are challenged in the questions presented in this cause, along with other grounds and reasons asserted as error. The prejudicial error complained of with reference to the rulings of the trial court in the admission and exclusion of evidence is blatantly recognized and compounded by the action of the jury in the Jeter case and compounds the trial court's error herein complained of.

The Petitioner's indictment alleges that he accepted a bribe from the alleged bribe payor on May 31, 1963. Pursuant to the alibi statute heretofore set forth the Petitioner gave notice to the Prosecutor that he would prove that he was in the State of Illinois during the entire day stated in the indictment. In its reply to the notice of alibi the State of Indiana said that it would prove that the offense occurred between 6:00 A.M. on May 28, 1963 and 12:00 Noon on May 29, 1963. A motion to make the reply to notice of alibi specific was overruled.

The evidence against the Petitioner at his trial consisted of the testimony of the alleged bribe payor who stated that he had paid the Petitioner twenty dollars between eight and ten o'clock on May 29th, 1963. (The alleged bribe payor amended this testimony on cross examination to state that the alleged payment occurred between the given hours on either May 28, 1963 or May 29, 1963.) Considerable evidence was presented through police records which showed the whereabouts of the Petitioner during most of the time in question. The alleged bribe payor also testified that he made a notation of the alleged illegal transaction on a scrap of paper which was introduced in evidence, over objection, as the sole corroboration of the actual alleged payment.

It was the State of Indiana's theory during the trial of this cause that the Petitioner had been accepting monthly bribes of twenty dollars for which he would refrain from arresting numbers writers. The only claimed witness to any of these transactions was the alleged bribe payor who admitted to a long string of arrests and convictions and to having been professionally involved in criminal activities for more than thirty years. (The alleged bribe payor further testified that he was a prisoner in the penitentiary and that he would be eligible for parole on the day following his testimony.) Two numbers runners testified that they were

in the business of running numbers for the alleged payor but they attested to no transactions or activities involving the Petitioner or that they were known by Petitioner.

The alleged payor testified that he had made no agreement with the Petitioner * but then he went on to testify that he believed that his employer, the actual owner of the numbers operation had made the agreement with Petitioner. This speculative testimony was given over the strenuous objections of the Petitioner. The alleged payor also testified that he himself did not know the identity of the more than one hundred numbers writers who were involved in the organization and that there were two other numbers organizations of equal size in the community. During all of the many months of the alleged bribe-taking the Petitioner had only a general patrol car assignment in various parts of the city. (Indianapolis, Indiana.)

On cross examination the alleged bribe payor attested to the fact that he was the prosecuting witness against the twenty-one police officers who had been indicted with

---

* There was no candor involved in the alleged bribe-taker's admission that he himself had made no agreements with police officers. The State's evidence was such that teleological necessity made it the State's theory that such arrangements had been made with every police officer in the city and the alleged bribe-payor would have been subject to considerable impeachment had he testified otherwise. By giving speculative testimony as to his employer's dealings the State's star witness rendered himself unimpeachable.

---

the Petitioner.

In the cross-examination testimony that followed, the alleged bribe payor gave such a vague and evasive account of his claimed bribe payments to the twenty-one other police officers who had been indicted that the matters spread of record on this occasion forced by the Prosecuting Attorney to drop the charges against the other officers.

There was no evidence to make the Petitioner a focal point of any protection which might be afforded the alleged bribe-paying numbers operation and the State of Indiana's theory necessarily was to the effect that Petitioner was one of several hundred police officers who were being bribed. The fact that the State of Indiana was endeavoring to sustain a theory with such vast implications on the lone testimony of a highly disreputable witness (who admittedly was motivated by his hope of clemency on the sentence he was serving on his gambling activities) made the credibility of the witness a crucial aspect of the trial before the jury and the trial court rulings which were made with respect to this aspect of the trial necessarily were important to Petitioner's appeal before the Indiana Supreme Court. The alleged bribe payor's speculative testimony as to how the Petitioner might have served the numbers organization in exchange for bribes also was crucial to the trial before the jury and the rulings of the trial court which were made with respect to this testimony were necessarily important to Petitioner's direct appeal. But by the operation of the heretofore quoted motion for new trial statute and the Indiana Supreme Court's Rules 2-6 and 2-40 as interpreted by the Indiana Supreme Court, the Petitioner was precluded from having the validity and propriety of the said rulings of the trial court determined on alleal for reasons resulting simply from the length of Petitioner's trial and from Petitioner's

financial condition and not from any factors rationally pertinent to the fundamental purpose of the trial and appellate process.

The uncontradicted testimony and in the remainder of the record was to the effect that Petitioner made less than sixty five hundred dollars per year, that at the time of the trial he had a bank account fluctuating between fifty and one hundred dollars, that he was possessed of a mortgaged house and an eleven year old '52 Buick which he owned outright, and a three year old Chevrolet car being financed. Giving full weight to even the innuendoes in the State's evidence, there was no suggestion that the alleged supplements to Petitioner's income exceeded two hundred forty dollars per year.

The Petitioner's trial lasted an entire week which is at least twice the length of the average felony jury trial in Indiana. The transcript of the evidence which was taken at Petitioner's trial was four times the length of the median sized transcript which results from felony trials. During the trial there were numerous rulings by the trial court which presented potential questions for review.

Eight points eventually were raised on the Petitioner's appeal. In deciding the Appeal the Indiana Supreme Court decided five of these questions on the basis of "waiver". The Indiana Supreme Court found, in effect, that the Petitioner had "waived" five out of the eight grounds for reversal which had been vigorously urged by Petitioner's counsel at Petitioner's own considerable expense.

Petitioner is fully aware that certain "waiver" doctrines must operate if there is to be an orderly appellate process. No attempt is being made to question the principle that errors must be preserved by objecting and bringing them

to the attention of the trial court at the time of their occurrence. While a criminal defendant has no burden with respect to the presentation of facts his burden is the same as that of a civil defendant with respect to matters of law except where there is deprivation of counsel. The Petitioner likewise has no quarrel with the principle that questions must be fully argued and all of the pertinent facts must be set out in a brief if they are to be considered on appeal. Petitioner is complaining of the additional requirement under Indiana law which makes it necessary for a convicted accused to procure a transcript with a word for word presentation showing all of the unlawful proceedings which he intends to complain of on appeal within thirty (30) days after the verdict and with no continuances being permitted for the preparation of such transcript. The statutes and Supreme Court rules which have been interpreted by the Indiana Supreme Court to contain this requirement have been set forth in the Statutes and Usages Being Questioned section of this brief.

Under the tenth question he is raising the Petitioner is urging that the presentation in evidence of a scrap of paper which contained the personal notations of the alleged bribe-payor deprived Petitioner of his right of confrontation because it was used to indicate the corrupt purpose of the alleged payment although no witness at Petitioner's trial claimed any direct knowledge as to that purpose. (This paper was claimed to be a memo to the owner of the numbers operation who was not available as a witness to either side because he chose to take the Fifth Amendment in open court.) In view of the obvious credibility factor inherent in the State's case, the fact that the alleged bribe-payor was permitted to utter speculative testimony of the sort which would not lend itself to cross-examination or cross-checking, and to present a persoman memo which was used to further such speculation, the rulings of the trial court on this point

amounted to far more than a mere state question as to the proper presentation of evidence, these rulings involved the basic right of confrontation.

Again in view of the obvious credibility factor a question of inherent fairness and fundamental due process is presented by the fact that the Petitioner was required to waive his strategic rights under the Fifth Amendment in advance of trial by stating his exact whereabouts at all times on the date stated in the indictment in order to learn the exact time and place of his alleged crime but the State was permitted to disregard the Alibi statute to the extent of maintaining secrecy as to the exact time and place which would be alleged until the damning testimony was uttered during the trial.

Also the court below, apparently decided, erroneously, that Petitioner was not deprived of a fair and impartial trial because of the trial court's participation in the examination of a witness with reference to the most crucial exhibit offered by the state in evidence, wherein the trial judge improperly interrupted a witness to qualify an exhibit for admission into evidence when an objection had been made but had not been ruled upon. The trial court thus impliedly communicated to the jury his own belief as to this key witness without contemporaneously warning or instructing the jury that they must reach their own independent conclusion as to the credibility of the witness. The trial court thus erroneously assumed the obligations of the prosecutor to properly qualify this crucial exhibit and in doing so, the court indicated to the jury the validity and weight to be given said exhibit.

The court below apparently gave great weight to the fact that sometimes either no formal objection was made during Petitioner's trial by counsel or that Petitioner's

counsel failed to properly raise objections as to the admission of evidence in the trial and that thus Petitioner waived any errors as to the admission or rejection of testimony in the trial. At this time no explanation can be made for failure of counsel to object except to observe that counsel probably correctly surmised that an objection would be of no avail under the circumstances.

Whether trial counsel so believed or not, it has been held by this court that it is the duty of the court to notice and correct errors where serious injury or prejudice would otherwise be suffered even though the errors were not challenged during the trial.

If there was prejudicial error in the trial court's conduct as the record unquestionably discloses, such an error cannot be waived by counsel and the implication in the decision of the court below that such might be or was the case is clearly in conflict with the decisions rendered by this court.

THE MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED

After the decision of the Supreme Court of Indiana, Petitioner timely filed a petition for rehearing which specifically raised the Constitutional issues herein embraced. That Petition was entertained by the state court though denied without opinion (R)

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is at variance with this court's holdings in Minnesota v. National Tea Company, 309 U.S. 551-559 and, State Tax Commission v. Van Cott, 306 U.S. 551 and Patterson v. Alabama, 294

U.S. 600, in that in each of those cases this court stressed the need for intervention by this court where there is a strong indication, as in this case, that the Federal Constitution as judicially construed controlled the decision below; especially where ambiguous or obscure adjudication by state courts stand as barriers to a determination by this court of the validity under the Federal Constitution of state action, with particular reference to the construction, application and interpretation of Indiana Acts 1935, Chapter 189, Sec. 1, p. 928 (Burns' 9-1133).

> "Criminal Procedure--Indictments and Affidavits--Amendments of--When
>
> Section 1. Be it enacted by the general assemby of the State of Indiana, That the court may at any time before, during or after the trial amend the indictment or affidavit in respect to any defect, imperfection or omission in form, provided no change is made in the name or identity of the defendant or defendants or of the crime sought to be charged."

and the pertinent parts of Indiana Acts 1935, Ch. 228, Sec. 3, p. 1198 (Burns' 9-1633)

> "At the trial, if it appears that the prosecuting attorney has failed to file and to serve upon the defendant or upon his counsel the prosecuting attorney's statement as prescribed herein, the court shall, in the absence of a showing of good cause for such failure by the prosecuting attorney, exclude evidence offered by the prosecuting attorney to show that the defendant was at a place other than the place stated in the defendant's original notice and that the time was other than the

time stated in the defendant's original notice."

With reference to the amendment of the indictment herein, we quote pertinent portions of the decision of the Indiana Supreme Court, "However, appellant contends that time is of the essence of the offense when alibi is pleaded, citing: Evans v. Evans (1946) supra., 224 Ind. 428.

The Evans case did not so hold however, but as heretofore indicated, after reiterating the rule that where time is not of the essence, any date prior to the filing of the indictment within the statute of limitations could be proved, simply stated such rule was subject to the limitations imposed by the alibi statute when invoked. We have heretofore pointed out why appellant's contentions concerning his motion to make specific and his objections to questions asked involving the alibi statute were not meritorious. In the Evans case the prosecuting attorney's statement in reply to the prisoner's notice of alibi in fact was quite similar to that in the case at bar as the date was there fixed as being" * * * between 10 o'clock P.M. November 24, and 7 o'clock A.M. of November 25. * * This Court there in affirming the judgment of conviction, stated at p. 433 of 224 Ind., and p. 548 of 69 N.E. 2d:

> "* * * It was not necessary, as appellant seems to think, to amend the affidavit to show the offense as having occurred between those hours. * * *"

If the amendment to the affidavit was not necessary to specify the hours alleged in the alibi statement in the Evans case, we are unable to see how an amendment of the same nature, which happened to be allowed in the case at bar, could be considered material or harmful to appellant."

With reference to the alibi statute we quote pertinent portions of the Indiana Supreme Court's opinion, "Appellant filed motion to require the State to make the answer to the notices of alibi more specific, setting up that the statute required inter alia that the State set forth the exact date when the offense was alleged to have been committed but that the State's answer in stating the offense occurred between 6:00 A.M. on May 28, 1963, and 12:00 Noon on May 29, 1963, alleged two dates and encompassed a period of 30 hours. The court overruled appellant's motion to make specific.

* * * Appellant then filed a second notice of defense of alibi under the statute setting forth appellant's whereabouts during the time and dates mentioned in the foregoing answer of the State.

Appellant also complains of the trial court's admission over his objection of evidence as to the commission of the offense during the 30 hours specified in the State's answer to the notice of alibi, which appellant states, was too broad a period to comply with the statute.

* * * It is of course true, as appellant concedes, where time is not of the essence of the offense, under an allegation of a specific date, the offense may ordinarily be proved as having occurred at any date preceding the filing of the affidavit or indictments which is within the statute of limitations. This rule we have held yields to the limitations imposed by the alibi statute when such statute is invoked.

Evans v. State (1946), 224 Ind. 428, 433, 68 N.E. 2d 546, 548

Section 2 of the alibi statute, above cited, in substance provides the defendant may require the State to file

a specific statement, in regard to the exact date (and the exact place) the prosecution proposes to prove such defendant committed the crime. The section following provides that at the trial if it appears the prosecuting attorney has failed to file and serve the prosecuting attorney's statement as prescribed herein, the court shall in the absence of a showing of good cause for such failure by the prosecuting attorney, exclude evidence by the prosecuting attorney that the defendant was at a place other than as stated in defendant's original notice and that the time was other than as stated in the defendant's original notice.

Appellant's motion to make more specific was general in form and did not allege an absence of good cause on part of the prosecuting attorney in failing to make a more definite statement. We are unable to see how the court's overruling of the motion was an abuse of discretion so as to constitute reversible error."

It is obvious, therefore, that the principle enunciated in Minnesota v. National Tea Company apply with equal force and effect here because of the ambiguous and obscure ruling by the Indiana Supreme Court, so we quote:

> "It is important that this Court not indulge in needless dissertations on constitutional law. It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this court of the validity under the Federal Constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases. Only

then can we ascertain whether or not our jurisdiction to review should be invoked. Only by that procedure can the responsibility for striking down or upholding state legislation be fairly placed. For no other course assures that important federal issues, such as have been argued here, will reach this court for adjudication; that state courts will not be the final arbiters of important issues under the Federal Constitution; and that we will not encroach on the constitutional jurisdiction of the states. This is not a mere technical rule nor a rule for our convenience. It touches the division of authority between state courts and this Court and is of equal importance to each. Only by such explicitness can the highest courts of the states and this Court keep within the bounds of their respective jurisdictions.

For these reasons we vacate the judgment of the Supreme Court of Minnesota and remand the cause to that court for further proceedings.

Judgment vacated."

Minnesota v. National Tea Company, supra

2. The Petitioner's opportunity to obtain a review of his criminal conviction on direct appeal was greatly diminished by two factors which were beyond the control of Petitioner and which had no rational connection with the validity or invalidity of Petitioner's cause. The appellate procedure of the State of Indiana denies equal protection of the law to defendants of moderate means and pauper defendants, especially where the defendant has been convicted after a lengthy trial.

Indiana Acts 1905, Ch. 169, Sec. 282, p. 584

provides that errors of law occurring at a trial may be considered on appeal only if they are cited in writing in a motion for new trial which must be filed in the trial court within thirty (30) days after the verdict or finding. The Indiana Supreme Court has held that an appellate question arising from an "error of law occurring at the trial" can be preserved for appeal only if the question asked the witness, the answer given, the objection made and the ruling of the trial court is presented in the motion for new trial with near word for word accuracy. For example, the following citations of error in a motion for new trial have been held to present no question whatsoever:

> "3. Error of law occurring at the trial in this, to wit, that the Court permitted in evidence a picture of the defendant over the objection of the defendant at the time of the trial.
>
> 4. Error of law occurring at the trial in this, to wit, court permitted witness Surgon (spurgeon) (Spurgeon) Davenport to answer certain questions asked by the prosecuting attorney concerning certain receipts alleged to be the property of the defendant over the objection of the defendant at the trial in violation of the defendant's constitutional rights."
>
> Triggs v. State (1957) 238 Ind. 260, 262, 149 N.E. 2d 545.

The Indiana Supreme Court has further held that the purpose of the motion for new trial is to give the trial judge the opportunity to review his own rulings before he becomes subject to reversal on appeal:

> "This is no technical rule, but a rule which has

its roots in solid reason. The purpose of setting out specifically the reasons why a new trial should be granted, is to inform the trial court of the various complaints relied upon by the applicant for a new trial and to call the same to the attention of the court for a review, and to afford it an opportunity to correct any error complained of. We must assume that the court below considered appellant's motion for a new trial as it was presented by the record and governed itself by the rule of law above mentioned."

Hamilton v. State (1934) 207 Ind. 97, 105, 190 N.E. 2d 870

This courtesy to the trial judge is deemed necessary by the Indiana Supreme Court in spite of the fact that "errors of law occurring at the trial" necessarily take place in the presence of the trial judge and he is deemed to have notice of everything which occurs in his presence.

It also has been held by the Indiana Supreme Court that a trial judge shall not have jurisdiction to grant a new trial on the basis of any grounds submitted to him after the thirty days have expired and that he may grant no continuances for the filing of a motion for new trial nor permit any amendment to grounds submitted prior to the expiration date if the amendment is presented after the expiration date.

"A court has no authority to grant an extension of time for filing a motion for new trial based only on alleged errors shown within the record."

Barker v. State, (1963) 244 Ind. 267, 191 N.E. 2d 9

"The right to file a motion for a new trial is conferred by statute. Webster v. State, (1935) 209 Ind. 274, 275, 198 N.E. 781. There is no statutory provision for the filing of a supplemental or subsequent motion after the period of time allowed by statute. Morton v. State, (1935) 209 Ind. 159, 198 N.E. 307; nor does any such right exist at common law, Webster v. State, supra. Since appellant's petition was for the granting of the right to file a subsequent (second) motion for a new trial and there is no statutory provision for such proceeding, the Marion Circuit Court was without jurisdiction to grant the remedy sought."

Blanton v. State, 234 Ind. 142, 124 N.E. 383, 384.

These rules of law have serious implications for the pauper accused, the accused of moderate means and even the accused of slightly better than average means. The protection which an accused of substantial means can anticipate under these rules must be regarded as different in kind from that afforded an accused of lesser means.

Where an accused is convicted after a lenghty trial which included a large number of questionable rulings by the trial court he is faced with the task of obtaining a transcript of these rulings and the testimony surrounding them within thirty days of the verdict or finding. If he has not hired a stenographer and had his own transcript made during the trial the accused has recourse only to the court reporter and if the court reporter is busy with transcripts for other appeals or if the court reporter is going on vacation or if the court reporter is simply uncooperative the accused has no recourse whatsoever because no continuance can be granted for

preparing a motion for a new trial.

The Indiana Supreme Court has taken notice of this difficulty and it has suggested a solution:

> "As judges, who as lawyers have engaged in trial work, we know that competent trial counsel can, should and will make adequate notes and memoranda during trial for use in preparing a motion for a new trial."
>
> State ex rel Macon v. Orange Circuit Court (1964) ___ Ind. ___, 198 N.E. 2d 229

But the strict, hair-splitting requirements which the Indiana Supreme Court has imposed under its ruling in the Barker case, supra, indicate that the hypothetical attorney who would prepare a motion for a new trial while defending his client at the trial itself would have to be a dexterous individual indeed. In any case, this hypothetically dexterous counsel would be acting contrary to the approach and demeanor which is expected of trial counsel. Cases should not be tried in contemplation of appeal; trial ethics require a concentration upon achieving a just result in the first instance.

In Griffin v. Illinois this Court uttered a very simple, straight-forward pronouncement of law which can be applied to the facts of the present case:

> "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."
>
> Griffin v. Illinois, 76 S. Ct. 585, 591, 351 U.S. 12 100 L. Ed. 891

The Griffin case produced the rule that where a state affords appellate review of criminal convictions and where a transcript of the evidence is essential to an appeal, an indigent accused must have the same opportunity to obtain a transcript that is afforded a wealthy accused. It should be noted that the above-quoted portion of the Griffin decision tacitly held that an accused's appellate opportunities will affect the fairness of his trial. More will be said on this subject later on in this brief.

In Douglas v. California the matter in question in the Griffin case was discussed even further to the following effect:

> "The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal."
>
> Douglas v. California, 83 S. Ct. 814, 372 U.S. 353, 9 L. Ed. 2d 811

It would be difficult to imagine a more meaningless opportunity to appeal than one which makes it necessary for an indigent accused to waive everything except the sufficiency of evidence and which leaves even a solvent accused at the mercy of the court reporter unless he is sufficiently wealthy that he can afford his own stenographer during the trial.

The general question being presented herein was considered by the Indiana Supreme Court last year in its reconsideration of State ex rel Macon v. Orange Circuit Court on remand from this Court. This Court remanded the Macon case in the light of Lane v. Brown, 83 S. Ct. 768, 372 U.S. 477, 9 L. Ed. 2d 892, which had applied the Griffin v. Illinois doctrine to Indiana's coram nobis appeals. The Macon

case which was remanded in the light of the Griffin and Lane v. Brown holdings presented the question of whether the appellant could be regarded as having waived questions presented by the rulings at the trial by reason of the fact that they had not been recited in a motion for a new trial and presented within thirty days after the verdict. The Indiana Supreme Court had this to say:

> ". . a pauper and a rich man alike are bound in this State by the action or non-action of competent trial counsel. So far as we can find, that principle is true in federal courts if there is a failure to file a motion for a new trial within five (5) days and no request is made within such time to file a belated motion as to matters occurring during the trial."
>
> . . . ."We do not believe the United States Supreme Court is deliberately imposing a double standard on state and federal courts in regard to the requirements of a transcript and the appointment of counsel in every case when a belated motion for a new trial (or writ of error coram nobis) is requested in a criminal case, particularly when no motion was filed within the liberal period of thirty (30) days in Indiana, compared to five (5) days under the rules approved for federal trial courts."
>
> State ex rel Macon v. Orange Circuit Court supra at p. 230

In the same Macon decision the Indiana Supreme Court went on to consider the practical difficulties of preserving errors in the motion for new trial and it suggested the solution involving the hypothetically dexterous

lawyer who has been described above.

The Indiana Supreme Court's interesting analogy with respect to the Federal motion for new trial is not well taken for obvious reasons. The actual method of perfecting federal appeals is precisely what the Petitioner is arguing should prevail in the state appellate courts if they are to afford every accused equal protection of the law.

It would appear from another Indiana Supreme Court decision that the court's misunderstanding of federal procedure is a matter of antipathy and not mere apathy:

> "The history of the Irvin case reveals the United States Supreme Court performing the function of a trial court rather than a court of appeals. Because of its violation of the principles of appellate review, such a decision can have no weight as precedent."
>
> Baker v. State (1964) ____ Ind. ___, 195 N.E. 2d 91

By the Indiana Supreme Court's decision in the Macon case and in Petitioner's case it is showing the same intention of circumventing Lane v. Brown that it demonstrated with respect to Irvin v. Dowd in the above quoted decision.

With respect to a pauper defendant the implications of Indiana's motion for new trial statute are obvious: Unless this court appointed pauper attorney decides to perform the additional task of badgering the court reporter for a transcript of the rulings of the court which occurred at the trial and to prepare an adequate motion for new trial the pauper can only expect an appeal on the question of suffi-

sufficiency of evidence if he send a petition from the penitentiary praying for the appointment of pauper appellate counsel. Since the pauper appellate counsel necessarily will not be the same lawyer who tried the case * and since most of the thirty days necessarily will have expired at the time of his appointment, he will have no recourse but to raise only the question of sufficiency in behalf of his client. With respect to a defendant whose economic status is equivalent to that of the Petitioner, the implications are not so obvious but they are equally fatal to his rights.

The inability of a defendant who earns sixty five hundred dollars per year to raise any substantial sum for his defense is a matter of common knowledge to defense counsel and to sociologists as well.

> "Even when suburbanites have not taken out a loan, the knowledge that loans are so readily available today has a pronounced effect on their budget habits. They have a highly inflated idea of the amount they can borrow. When the young couples are asked how much they could raise in an emergency, the median response is usually $2000 to $3000. As a check with bank officers indicated,

---

* In Sparks v. State, (1964) ___ Ind. ___, 196 N.E. 2d 748 the Indiana Supreme Court very correctly held that it is reversible error to appoint trial counsel as pauper appellate counsel where trial counsel, by reason of the fact that he did not file a motion for new trial on his own incentive but left it for the appellant to do so, has made it a matter of record by the said omission that he is of the opinion that an appeal would not be well taken.

many of them would be lucky to raise $500. Going by the usual rule of thumb, on a personal, unsecured loan the husband could borrow up to roughly 20 per cent of his annual income. This would mean that couples in the $5000 to $7500 bracket would be able to raise little more than $1,500 provided they had no other debt outstanding. Which would be most unusual .

The Organization Man, William H. Whyte, Jr., Simon & Schuster, 1965, p. 356

In his motion for new trial the Petitioner in this cause submitted a large number of lengthy citations of error which included the following citation:

"3. Error of law occurring at the trial, in this, that the Court permitted the witness, Van Wert Mullin, to answer the following question put to him as a witness by the prosecuting attorney over the objection of the defendant upon direct examination which question, objection and ruling of the Court and answer are as follows:

Q. Did you, the following Saturday when you accounted to Mr. Mitchell, did you make the accounting to him at that time of that payment?

Mr. Sullivan: I think I will object to that, Your Honor, it would be hearsay completely.

Mr. Bath: Your Honor, this is, we are getting into business practices and business methods of this.

Mr. Sullivan: Your Honor, I can't imagine that this would qualify into the business record exception of the hearsay rule.

The Court: He testified as to the various transactions he had in the course of his business operation. I think this would come under the same category. He may answer.

Mr. Sullivan: Your Honor, may I ask if the Court is ruling that gambling is a business that comes with the exception of the hearsay rule?

The Court: Well, I am concerned the shop book rule and business, business entry rules in general. Now, I am not going to come out and hold right now that gambling isn't a business. I am afraid it is one of the biggest businesses in the world. There wouldn't be a State of Nevada. Well, I am going to permit him to answer it.

Mr. Sullivan: May I ask a preliminary question before?

The Court: You may?

Direct Preliminary Examination

Questions by Mr. Sullivan

Q. Was any report that you gave to Mr. Mitchell on that particular Saturday oral?
A. No.
Q. In writing?
A. In writing.
Q. Was the defendant present at that time?
A. No, he was not present.
Q. And you made this writing yourself?
A. I did.

Mr. Sullivan: Our objection is renewed, Your Honor.

The Court: Show the same ruling.

The issue created by this citation was argued on the merits in the Petitioner's Appellant's Brief and it was responded to on the merits in the State of Indiana's Appellee's Brief without any mention being made of any technical defect. The Indiana Supreme Court disposed of this question in the last paragraph of its decision which reads as follows:

> "Also, appellant's contentions as to the overruling of his objections to further questions asked of the witness Van Wert Mullin are waived in view of the failure of appellant to set out in his motion for new trial any answers given by the witness to such questions, in substance or otherwise.
>
> See: Jay v. State (1965) supra, and cases heretofore cited." (The cite is part of the decision).

The Jay case which was the basis of the above-quoted ruling in this case contained the following holding with respect to motions for new trial.

> "Appellant further contends the court erred in overruling appellant's objection to a question propounded by Appellee as to who was the owner of the property on 200 West Ohio. However, it does not appear that this question was answered and therefore no question is before us as to the correctness of the Court's ruling. Henderson v. State (1965) 235 Ind. 132, 134."

Jay v. State, (1965) ___ Ind. ___, 206 N.E. 2d 128

The Henderson decision which was the basis of the above quoted Jay holding disposed of the only issue which was presented in the following manner:

> "As the third and final cause for a new trial, appellant asserts that the trial court erred in admitting testimony by Officer Cross and "All other witness for the State of Indiana" which resulted from the entrance, by Officer Cross and his partner, into the apartment of Appellant without having a search warrant therefor." ... In order to present a question of error in the admission of evidence, the question asked must be set forth in full or in substance, together with the objection, the answer, if any, and the Court's ruling thereon."

Henderson v. State, (1956) 235 Ind. 132, 131 N.E. 2d 326

The Henderson decision would suggest that a "substantial" presentation of the error complained of in the motion for new trial will suffice but the Henderson decision itself, the decision in Petitioner's present case and the heretofore quoted Triggs decision make it very apparent that an Indiana criminal appellant proceeds at his peril unless he has a word for word recitation of the matters complained of in his motion for new trial.

The citation of error which the Indiana Supreme Court chose to disregard for the heretofore given technical reasons stated in the final paragraph of its decision involved the question of whether the Petitioner was deprived of his right of confrontation, which clearly presented an important state question if not a federal question. The answer which the alleged bribe-payor gave to the objected to question was in the record before the Indiana Supreme court and that answer was even used in that Court's evaluation of the sufficiency of the evidence as is shown by the following extract from the Court's opinion:

> "On June 1, 1963, Mullin made a routine accounting of the week's expenditures to Tuffy Mitchell."

Yet the Indiana Supreme Court refused to consider the propriety of this item of evidence which it used in its summary of the evidence simply because the answer to the question objected to was not set out for the benefit of the trial judge in the motion for new trial. Under the rules of any court the trial judge had notice of this answer in any case and the likelihood of a motion for new trial being sustained in any case is so small that the Petitioner's lapse was far too trivial to constitute the basis of an implied waiver of an important point.

In Henry v. Mississippi this Court held that state rules of procedure can be disregarded for the purposes of considering a federal question if the rule serves no rational purpose under the facts of the case and if the failure to meet the rule was manifestly a matter of inadvertance and not a matter of strategy:

> "The Mississippi Rule requiring contemporaneous objection to the introduction of illegal evidence clearly does serve a legitimate state interest. By immediately apprising the trial judge of the objection, counsel gives the court opportunity to conduct the trial without using the tainted evidence. If the objection is well taken the fruits of the illegal search may be excluded from jury consideration, and a reversal and a new trial avoided. But on the record before us it appears that this purpose of the contemporaneous objection rule may have been substantially served by petitioner's motion at the close of the State's evidence asking for a directed verdict because of the erroneous admission of the officer's testimony. For at this stage the trial judge could have called for elaboration of the search and seizure argument and, if persuaded, could have other appropriate corrective action. For example, if there was sufficient competent evidence without this testimony to go to the jury, the motion for a directed verdict might have been denied, and the case submitted to the jury with a properly worded appropriate cautionary instruction. In these circumstances the delay until the close of the State's case in presenting the objection cannot be said to have frustrated the State's interest in avoiding delay and waste of time in the disposition of the case.

> If this is so, and enforcement of the rule here would serve no substantial state interest, then settled principles would preclude treating the state ground as adequate; giving effect to the contemporaneous objection rule for its own sake would be to force resort to an arid ritual of meaningless form."
>
> Henry v. Mississippi (1965) 85 S. Ct. 564, 568

The present Petitioner's plea differs from that of the Petitioner Henry in that the present Petitioner is seeking to attack the state court's theory of implied waiver itself rather than to have the waiver set aside for the purpose of bringing another question to the fore. It is the above-quoted rationale which was used in reaching the Henry decision which is being cited as authority rather than the holding itself. Such a doctrine of implied waiver as the Indiana Supreme Court has imposed does more than merely operate as a potential shield to federal questions; in and of itself it presents a very serious question of equal protection of the law.

The criminal appellate system is designed to be a Damocles sword over the head of the errant trial judge who would abuse his discretion in his handling of the trial process and the imminence of appellate review on every question presented is essential to the obtaining of justice under modern trial procedures. If the trial judge can find assurance in the fact that the accused will not be able to preserve the questions being presented for further presentation on the appellate level, his mental approach to the said questions undoubtedly will differ from what it would be in the case of a wealthy accused who manifestly will be able to present everything in his motion for new trial because he has a stenographer making a record for that purpose. The answer, of course, is not to insist that every

defendant have such stenographic assistance; the answer lies simply in eliminating the exacting provisions which have been created under Indiana's motion for new trial statute and which serve no rational purpose.

3. In the tenth and twelfth questions he is presenting, the Petitioner is urging that the writ being prayed for should be granted so that this Court may determine whether the right of confrontation extends to the point of excluding hearsay evidence as a matter of constitutional law applicable to the states.

In its recent decision in Pointer v. Texas this Court unequivocally imposed the right to confrontation upon state criminal process:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross examination is an essential and fundamental requirement for the kind of fair trial which is this country's goal. Indeed, we have expressly declared that to deprive an accused of the right to cross examine the witness against him is a denial of the Fourteenth Amendment guarantee of due process of law."
>
> Griffin v. California, (1965) 85 S. Ct. 1224

The right of cross examination is meaningless when the actual witness to the matters in question is not in court. The Petitioner was accused of entering into an illegal bribe agreement with the owner of a numbers business and when the owner appeared in court he took the Fifth Amendment

and neither party to this lawsuit was able to elicit any answers from him.

This is not to say that the transaction in question could not be proved simply because the owner would not testify or that the Petitioner's rights necessarily were violated because he was convicted of this illegal agreement without the owner's testimony. There is no question that such a transaction could legally be proved by circumstantial evidence without the testimony of either party to the agreement. But it was not proved by circumstantial evidence in this case --it was "proved", rather, by the testimony of a witness who was not a witness to any such agreement but who presented his own mental operations as to what he thought must be the agreement.

This highly important question never was decided by the Indiana Supreme Court because of the matters described in the preceding portion of this presentation; but this question was presented to the Indiana Supreme Court as fully as a proper appellate presentment should require.

4. Under Indiana's Alibi statute which is set forth earlier in this brief, the Petitioner in this cause was required to waive his right to pre-trial silence to the extent of informing the Prosecuting Attorney as to his whereabouts on the day stated in the indictment and on the days stated in the State's Answer to his Notice of Alibi if he wished to avail himself of his rights to testify as to his whereabouts when he came to trial.

The existence of the right to pretrial silence by an accused as well as his right to silence at all times is so well established that it requires no citation of authority to demonstrate its said existence. Even the indirect ramifications of the right against self-incrimination have been imposed upon

State criminal process by this Court.

See: Griffin v. California, (1965) 85 S. Ct. 1929

The existence of an accused's right to testify in his own behalf is not so clear but the concurring opinions of Justices Frankfurter and Clark in Ferguson v. Georgia, 365 U.S. 570, 81 S. Ct. 756, 5 L. Ed. 2d 783, made it very clear that this Court would so hold if it were presented with that particular question. In Ferguson, this Court held "We therefore hold that, in effectuating the provisions of Sec. 38-415, Georgia, consistently with the Fourteenth Amendment, could not in the context of Sec. 38-416, deny appellant the right to have his counsel question him to elicit his statement. We decide no more than this. Our decision does not turn on the facts that the appellant was tried for a capital offense and was represented by employed counsel. The command of the Fourteenth Amendment also applies in the case of an accused tried for a noncapital offense, or represented by appointed counsel. For otherwise, in Georgia, 'the right to be heard by counsel would be of little worth'. Chandler v. Fretag, 348 U.S. 3, 10, 99 L. Ed. 4, 10, 75 S. Ct. 1." It is obvious therefore that the restriction imposed by the questioned Indiana Statutes is likewise constitutionally infirm and the limitations imposed by the trial Court's ruling comes within the purview of Ferguson, supra.

The fact that Indiana's alibi statute requires an accused to waive his right to pre-trial silence in order to avail himself of his right to testify renders that statute constitutionally questionable at the very least. But this is not the attack which the Petitioner is making in this case. The Petitioner's case presents a far more serious constitutional question.

The State of Indiana's reply to the Petitioner's notice of alibi stated the exact place of the alleged offense as required by the alibi statute but the time was spread over a period of thirty six hours. The actual testimony presented at the trial placed the event in question at the time of between 8:00 and 10:00 A.M. of either of the days stated in the State's reply. It thus appears that the State of Indiana could have narrowed time stated in its reply to the notice of alibi to a period of four hours but it spread the time over thirty six hours. The State of Indiana thus defaulted in its obligations under Indiana's alibi statute while the Petitioner was required to waive his right to pre-trial silence to no avail.

It is possible that Indiana's alibi statute might be constitutional as generally applied because it does afford an accused the opportunity to obtain some limited pre-trial discovery in exchange for the waiver of some of his rights even though this waiver cannot be considered voluntary if the accused wishes to testify as to his whereabouts at the time of the alleged crime when he is placed on trial. But the alibi statute loses all possible constitutional justification where it is applied to the facts of this case because the State was permitted to default in its obligations under the said statute.

The question herein was presented to the Indiana Supreme Court in the Petitioner's direct appeal and it was disposed of in the following manner:

> "Appellant's motion to make (The State's reply to alibi) more specific was general in form and did not allege an absence of good cause on part of the prosecuting attorney in failing to make a more definite statement. We are unable to see how the court' s overruling of the motion was an

abuse of discretion so as to constitute reversible error"

The Indiana Supreme Court's response to this novel question of law was to add a new technicality to its long list of such creations and hold that where the State fails to make a specific response to a notice of alibi as required by the alibi statute, the accused must affirmatively allege an absence of good cause for the State's failure to do so even though the accused has no rights of discovery and no means of availing himself of the information with which to do so. The capricious disposal of this question by the Indiana Supreme Court was in total disregard of the Petitioner's constitutional rights.

5. The Court below apparently gave great weight to the fact that no formal objection was made during the Petitioner's trial by counsel, which the Indiana Supreme Court ruled amounted to a waiver of the same. The Court suggestion that by counsel's failure to object that there was a waiver of the matters which are objected to here on appeal.

In discussing these so-called (waivers) we will first discuss the trial court's participation in the examination of Van Wert Mullin, chief witness for the state concerned State's Exhibit Number Six, which was purportedly a record made regularly in the course of a gambling business and the Court admitted in evidence after the following examination by the Court.

QUESTIONS BY THE COURT

Q. Mr. Witness, these writings in red on here, did you place there?
A. Yes, sir, I did.

Q. Who actually made the tape with the adding machine numbers on it?
A. I did.

THE COURT: I will overrule the objection. Show State's Exhibit Six admitted into evidence over objection and displayed to the jury. Now, at this time, we are going to take a short recess. I wish counsel for each side would remain while the jury examines this, and the jury will remain in the box until they have. When they have finished examining it, then you may go to your juryroom for the balance of the recess. The rest of us will stand at ease. (Reporter's Note: State's Exhibit Number Six was exhibited to the jury.)

It is noteworthy that this exhibit was the only proof offered by the State of Indiana to sustain the conviction herein appealed from and the action of the court and the trial court's conduct in this question was so improper and prejudicial as to deprive Petitioner of a fair and impartial trial.

Judge L. Hand in United States v. Marzano, 149 F. 2d 923, at p. 926, enunciated the principle that a judge must refrain from "exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded particularly in criminal trials. Despite every allowance he must not take on the role of a partisan; he must not enter the lists; he must not by his ardor induce the jury to join in a hue and cry against the accused. Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge." (Emphasis added)

In the leading case of Adler v. United States, 182 Fed. 464 at p. 472 , it was stated:

> "But the conduct of the judge, in the performance of all his duties, should appear to be impartial. The impartiality of the judge-his avoidance of the appearance of becoming the advocate of either one side or the other of the pending controversy which is required by the conflict of the evidence to be finally submitted to the jury - is a fundamental and essential role of the special importance in criminal cases. The importance and power of his office, and the theory and rule requiring impartial conduct on his part, make his slightest action of great weight with the jury. While we are of the opinion that the judge is permitted to take part impartially in the examination or cross-examination of witnesses, we can readily see that, if he takes upon himself the burden of the cross-examination of defendant's witnesses, when the Government is represented by competent attorneys, and conducts the examination in a manner hostile to the defendant and the witnesses, the impression would probably be produced on the minds of the jury that the judge was of the fixed opinion that the defendant was guilty and should be convicted. This would not be fair to the defendant, for he is entitled to the benefit of the presumption of innocence by both judge and jury until his guilt is proved. If the jury is inadvertently led to believe that the judge does not regard that presumption, they may also disregard it."

In Williams v. United States, 93 F. 2d 685, the Ninth Circuit Court defined its position as to the manner and extent of the participation of a trial judge, at page 691, as follows:

"The extent to which a trial judge should examine witnesses was well expounded by the Supreme Court of California in People v. Boggess, 194 Cal. 212, 241, 228 p. 448, 460; 'There can be no doubt that it is the duty of the trial court if the exigencies of the occasion require it, to facilitate, by one or more proper interrogatories, the direct and cross-examination of a witness. But for the court to repeatedly take the defendant as a witness out of the hands of his counsel, who as the record before us shows, was apparently competent, conscientious and expeditious in his conduct of the case, and proceed along an independent and extensive line of examination and cross-examination, is not only not commendable, but highly irregular, and for the sake of due and orderly administration of justice should not be indulged in. Ordinarily the proper course, and the one generally pursued, is to allow the examination by counsel - direct, re-direct, and re-cross - to conclude, and then if anything in the judgment of the trial court remains obscure, which may be material for the jury to know, and it seems desirable that an examination of the witness should be further pressed, than with perfect propriety the trial court may, and indeed should, intervene, so that the ends of justice may be subserved. This however should be done with care, particularly where the witness is a defendant in the case, lest the jury should, because of the court's intervention, and because of that fact alone, indulge in adverse inferences and conclusions from the testimony of the witness."

And in the recent case of In re United States, 286 F. 2d 556 (1961), at page 561, the Court facing a situation

similar to that found in the instant case stated:

> "This record provides the prime example of the consequences of overzealous participation in the examination of witnesses by the trial judge, for it is clear that the judge's sharp, persistent, sometimes almost badgering, questioning and caustic remarks first made the witnesses wary and overcautious and then confused them into inconsistencies and in addition disrupted the orderly presentation of the Government's case according to the plan outlines to jury by the Assistant U. S. Attorney by taking its witnesses into matters they were not offered to cover in their testimony. Running cross-examination from the bench, particularly during a witness' direct examination, is an innovation in trial practice which definitely does not have the approval of this Court."

As the court below disregarded the principle expressed in the decisions called to their attention, there has been raised the extremely important question of an extent to which a trial judge in a criminal case may participate in the examination of the one material witness for the state during the course of a trial, a question which has not been, but should be decided by this court.

It is reversible error for the trial court to have interrogated the sole witness for the state on this most important exhibit where the court assumed the obligations of the Prosecutor to properly qualify the exhibit, the alleged tape record, and in doing so the trial court indicated to the jury the validity and weight to be given the exhibit which was the sole evidence introduced by the State of Indiana to corroborate and substantiate a criminal and perjurer who bargained with the State of Indiana to

gain his liberty in exchange for testifying for the State of Indiana.

6. The conviction herein appears to be in conflict with this court's pronouncements in Douglas v. California, 372 U. S. 353, involving appellant opportunities where the record is unclear or the errors are hidden; and where equal protection of the law does not exist if the kind of an appeal a man enjoys depends upon the amount of money he has; the case further holds that equal protection of the law is lacking where a defendant with funds, appealing as a right from a conviction, enjoys benefit of counsel, while an indigent defendant, if he chooses to carry out such an appeal, is handicapped by being forced to run the gantlet of a preliminary showing of merit, thereby disclosing that the right to appeal does not comport with fair procedure; the analogy in this case being that the financial resources of Petitioner is such that on his meager income as a police officer, he was unable to secure a complete portion of the Bill of Exceptions containing the evidence so as to guarantee to him a review of all the errors of law occurring at the trial, and where he has to depend upon the sufficiency of the evidence to obtain appellant review.

The opinion of the Supreme Court of Indiana is full of statements "is deemed to have waived" and some of the waives involve the most serious aspects of the trial concerning admission of evidence over objection in the trial court, as well as admission of evidence without objection. Under Indiana law, an appellant in order to preserve a question of error in the admission of evidence over an objection in the trial court must set forth the question, his objection, the ruling of the court, and the answer of the witness. We have hereinabove set out how appellant was prejudicated by the Indiana rule with reference to the thirty day time limit in preparing and filing his motion for a new trial. Appellant's appeal to the

Indiana Supreme Court was emasculated by a pertinent portion of the Indiana Supreme Court's decision, which reads as follows:

> "However, appellant contends that time is of the essence of the offense when alibi is pleaded, citing:
>
> Evans v. State (1964), supra 224 Ind. 428.

The Evans case did not so hold however, but as heretofore indicated, after reiterating the rule that where time is not of the essence, any date prior to the filing of the indictment within the statute of limitations could be proved, simply stated such rule was subject to the limitations imposed by the alibi statute when invoked. We have heretofore pointed out why appellant's contentions concerning his motion to make specific and his objections to questions asked invoking the alibi statute were not meritorious. In the Evans case the prosecuting attorney's statement in reply to the prisoner's notice of alibi in fact was quite similar to that in the case at bar as the date was there fixed as being" * * * between 10 o'clock P.M. November 24, and 7 o'clock A.M. of November 25. * * *" This Court there in affirming the judgment of conviction, stated at 9. 433 of 224 Ind., and p. 548 of 68 N.E. 2d:

> "* * * It was not necessary, as appellant seems to think, to amend the affidavit to show the offense as having occurred between those hours. * * *"

If an amendment to the affidavit was not necessary to specify the hours alleged in the alibi statement in the Evans case, we are unable to see how an amendment of the same nature, which happened to be allowed in the case at bar, could be considered material or harmful to appellant."

In Griffin v. Illinois, 351 U.S.12, this Court made certain prescriptions involving appellant's review of criminal convictions where the transcript of the evidence is essential to an appeal sought by indigents; the parallel here is that appellate's review under the provisions of the Indiana statute involved the time element in filing a motion for a new trial is denied petitioner because of his financial inability to secure those pertinent portions of the transcript wherein errors of law regarding the admission and rejection of evidence are sought to be raised.

In Griffin v. State of California, 85 S. Ct. 1229 (1965) holding that the Fifth Amendment applies to the states in all its refinements, citing Mallory v. Hogan, 378 U.S. 1, "It would be incongruous to have different standards determine the validity of a claim of privilege**, depending on whether the claim was asserted in a state or federal court"; the similarity of this case to the case at bar is that Petitioner was denied due process of law from the very inception in the instant case up to and including the denial of the petitioner for rehearing. The denial of due process was exemplified by the holding of the Indiana Supreme Court that the evidence was sufficient to sustain the verdict; due process was certainly denied by the holding of the Indiana Supreme Court. That Petitioner waived five of the eight grounds he alleged in his appeal; the pernicious doctrine of waiver as enunciated by the Indiana Supreme Court with reference to properly raising errors of law occurring during the trial is further compounded by the contention of Petitioner herein that adequate appellate review is precluded by the thirty day requirement in filing a motion for a new trial, and the financial inability of Petitioner to secure those pertinent portions to properly raise the same.

Certainly the conviction herein does not follow the

prescription of this court as set out in Henry v. Mississippi, 85 S. Ct. 564, 568, concerning implied waiver, and that question is more thoroughly briefed in other portions of this brief.

The uncorroborated testimony of the state's key witness, Van Wert Mullin, ex-convict who bargained with the State of Indiana for his liberty in order for the state to secure his testimony is another reason why this court should grant certiorari. The trial judge failed to give the jury the cautionary instructions as to the uncorroborated testimony of the decisive State's witness, Van Wert Mullin, and consequently petitioner was deprived of that safeguard while admittedly in the Federal jurisdiction, accused may be convicted upon the uncorroborated testimony of an accomplice. Holmgren v. United States, 217 U.S. 509 (1910). This rule is inextricably interwoven with the requirement that the Court instruct the jury that the accomplice's testimony must be viewed with extreme caution, that this is not necessarily true in the State case.

But, where as here, the cautionary instruction is not given, conviction rests upon the uncorroborated testimony of an ex-convict who bargained with the State for his liberty in exchange for his testimony considered by the jury without the standard necessary to protect the defendant. The claim of denial of due process, although asserted in the State court, is binding on the Indiana Supreme Court because of the application of Griffin v. California, supra. The result in this case so clearly threatens the administration of justice as to require correction even where there is a failure to request the cautionary instruction at trial. United States v. Levi, 177 E. 2d 827 (7th Cir. 1959); Sykes v. United States, 205 Fed. 909 (8th Cir. 1913); Stephenson v. United States, 211 F. 2d 702 (8th Cir. 1954). There is a dearth of decisions on these points occasioned probably by the rarity of their

occurrence.

The questions raised in the Indiana Supreme Court concerning alibi are questions of first impressions in the Indiana Supreme Court; likewise, an amendment to the indictment is a question of first impression. Therefore, because of the importance of these questions and their constitutional implications, either this Court should grant Certiorari and rule on these questions or should send the case back to the Supreme Court of Indiana with instructions to render a clear opinion on these points. The Indiana Supreme Court denied petitioner his right to review by failing to fully render its opinion on the petitions claimed errors therein. The ruling of the Indiana Supreme Court that petitioner had "waived" five of his eight points emasculated his right of appeal. Our complaint is not academic, it is absolute fact, and the denial of due process of law and equal protection of the law is further heightened by the fact that in the companion case of State of Indiana v. Jeeter, supra, the defendant was acquitted because the same trial court restricted the State of Indiana and limited the issues and the admission of evidence with the same witnesses on the same charge as the case at bar. Constitutional deprivation of Petitioner were further exemplified by the fact that twenty-one policemen, whose names appear in State's Exhibit Number Six, and for clarity and proof are as follows:

Buskett	$100.00
Pearsey	100.00
Shahbut	100.00
Geigerick	100.00
Conroy	30.00
Qoatman	30.00
Dux	30.00
Gruner	30.00
Woodall	30.00
Watkins	30.00

Donahue	30.00
Stegelmeyer	20.00
Corydon	20.00
Gatto	20.00
Mullin	20.00
Hindman	20.00
Rene	20.00
Fendley	20.00
Brenton	20.00
McMichael	20.00
Alkire	20.00

escaped prosecution by the refusal of Van Wert Mullin the State's star criminal witness to testify before the Grand Jury concerning them. It is inconceivable and unconscionable to permit the great State of Indiana to make a sacrificial goat of Petitioner herein in view of the constitutional infirmities in this conviction.

There is manifest prejudicial error in the trial court's conduct of the case as the record unquestionably discloses and such errors cannot be waived by counsel, and the implications in the decision of the Court below that such might be or was the case is clearly in conflict with the decision rendered by this court. The decision of the Indiana Supreme Court disregards the principle discussed in the cases cited in the briefs filed therein concerning the questions raised and the circumstances requiring intervention and the manner in which participation should be taken by both the trial Court and the Indiana Supreme Court.

Whether trial counsel so believed or not, it has been held by this Court that it is the duty of the Court to notice and correct errors where serious injury or prejudice would otherwise be suffered, even though the errors were not challenged during the trial.

Williams v. United States, 66 F. 2d 868, 869; Benson v. United States, 112 F. 2d 422, 423; Brasfield v. United States, 272 U.S. 448, 450; United States v. Telkinson, 297 U.S. 157, 160.

The Supreme Court of Indiana had the power and the duty to search the record and notice any error that appears in the record, whether or not called to its attention. Herzog v. U.S., C.A. Cal., 226 F 2d 561 adhered to 235 F. 2d 664, certiorari denied 77 S. Ct. 54, 352 U.S. 844, 1 L. Ed. 2d 59 - Moss v. U.S. C.C.A. Mich., 132 F. 2d 875.

In Thompson v. State, 66 N.E. 2d 597, 224 Ind. 290, the Supreme Court of Indiana said:

> "This court will not pass upon the credibility of the witnesses, or weigh the evidence on appeal. In such matters it will not disturb the finding of the jury and judgment of the trial court, if there is substantial evidence to support each essential element of the offense charged. Walker v. State, 1934, 206 Ind. 232, 236, 189 N.E. 127; Whitney v. State, 1934, 206 Ind. 562, 570, 188 N.E. 779; Smith v. State, 1937, 212 Ind. 605, 609, 610, 10 N.E. 2d 899; Willinnar v. State, 1935, 209 Ind. 264, 268, 198 N.E. 799.
>
> Admitting that this is the law, the writer of appellant's brief says he feels that, " * * * in the interest of justice, this court should be asked to review the record in its entirety and determine whether or not, in the opinion of this court, justice has been administered as the law contemplated."

> While we are not required to do so, we have examined the record. Appellant has pointed out no lack of evidence to sustain the judgment and we have found none. We feel that the finding and judgment below is fully sustained by the evidence."

In the instant case the Indiana Supreme Court may have examined the record but their opinion is barren as to determinations of certain questions which has the total effect of denying Petitioner of a fair and impartial trial in violation of the due process clause of the Fourteenth Amend ment of the United States Constitution. The State of Indiana has failed to rule on some pertinent questions and its opinion is ambiguous and obscure on others. The Indiana Supreme Court failed to take into consideration that a statute may be valid as applied to one state of facts, and yet invalid when applied to another. (Dahnke-Walker Company v. Bondurant, 257 U.S. 282, 289; DuPont v. Commissioner, 289 U.S. 685, 688.

By reason of the fact that the questions involved in the construction, application and interpretation of the statute relating to alibi and the Court's ruling on amendment to an indictment and the statutes relative thereto, being questions of first impressions in the Indiana Supreme Court, this court should either grant certiorari and rule on these questions or send the case back to the Indiana Supreme Court, with instructions to render its opinion fully and completely on these points.

Where, as here, there are special circumstances in- volving the conduct of twenty-three police officers and where twenty-two escaped conviction, and one of whom had a trial on the same issues as appellant herein, there is an honest doubt as to fairness of the trial in question, especially

where the case is a close one as shown by the verdict of the jury exculpating a fellow police officer whose participation in the alleged crime was greater than that of your petitioner here.

One of the primary questions concerned here is whether under federal law the Indiana Penal Code facts concerning alibi and amendment of indictment is rendered void and of no legal effect in the instant case by applying it herein as to and under the particular facts and circumstances of Petitioner's case; and, whether Petitioner's federal rights permit the application of those facts to him.

The error is so plain and fundamental and so adversly affects the substantial rights of Petitioner, that both the trial Court and the Indiana Supreme Court should have noticed it although the issues may not have been raised either in the trial Court or in the Appellate Court, where, as here, a federal right is specially asserted. When the issue of due process is advanced, the Indiana Supreme Court should have independently searched the record and made inquiry as to whether such right was expressly or in substance and in fact denied by trial Court, and even though rights guaranteed by the Federal Constitution have not been specifically violated, the Indiana Supreme Court should have inquired fully and completely by searching the record to ascertain whether the judgment rests on a fair and substantial basis. This the Indiana Supreme Court failed to do.

The accumulation of errors demonstrated by the trial Court and the affirmance of the judgment of conviction by the Indiana Supreme Court, taking into consideration all the aforementioned matters, had the total effect of denying Petitioner a fair and impartial trial under the extraordinary circumstances complained of.

CONCLUSION

In disposing of challenged state criminal proceedings this Honorable Court has applied almost exclusively the "Fair Trial" doctrine; because of the numerous constitutional rights in his trial, we deem it pertinent to quote Henry v. Mississippi, supra, quoting Lovell v. City of Griffin, 303 U.S. 4444:

> "When as here there is a plain assertion of federal rights in the lower court, local rules as to how far it shall be reviewed on appeal do not necessarily prevail.***
>
> Whether the right was denied or not given due recognition by the (state court) *** is a question as to which the plaintiff's are entitled to invoke our judgment."
> Lovell v. Griffith, 266 U.S. 32, 33-34, 45 S. Ct. 12, 69 L. Ed. 157.

For the reasons above stated, especially by the Indiana Supreme Court's pronouncement that petitioner had "waived" five of his eight errors alleged on appeal, this Petitioner has been denied his constitutional rights of a fair, impartial and legal trial before, during and after his trial and on his appeal.

It is the duty of all courts to see that every person tried for a crime be given a completely fair and impartial trial, and see that none of his constitutional rights are violated or denied. To do otherwise would reduce the judicial process to a sham, and the fundamental aspects of fairness result in a miscarriage of justice.

It is therefore respectfully submitted that Certiorari be

be granted and that the judgment of the Indiana Supreme Court be reversed, or in the alternative, that this Honorable Court vacate said judgment and remand said cause to the Indiana Supreme Court for further proceedings not inconsistent with an appropriate opinion.

Respectfully submitted,

WILLIAM C. ERBECKER
Attorney for Petitioner

"APPENDIX "A"

IN THE

SUPREME COURT OF INDIANA

JACK R. HERMAN, Appellant	)	
vs.	)	NO. 30722
THE STATE OF INDIANA Appellee	)	

APPEAL FROM MARION CRIMINAL COURT DIVISION I
HONORABLE EUGENE M. FIFE, JR., JUDGE

LANDIS, JUDGE.

Appellant, a police officer of the city of Indianapolis, was indicted for bribery and after a jury trial was convicted and sentenced for a term of two (2) to fourteen (14) years and fined the sum of one thousand dollars ($1,000.00). Appellant assigns as error on appeal the overruling of his motion for new trial.

Among the numerous contentions of appellant on this appeal are the contentions that the verdict of the jury was not sustained by sufficient evidence, was contrary to law, and that the court erred in refusing to peremptorily instruct the jury to return a verdict for appellant.

In order to consider this matter it will be necessary that we examine the evidence in the cause favorable to appellee

which was substantially as follows:

From the late nineteen thirties through the early nineteen sixties there was a large scale grambling operation in the city of Indianapolis owned by one Isaac Mitchell who was also known as Tuffy Mitchell. During these years Mitchell acquired a long police record and became well known to the Indianapolis Police Department as a numbers racketeer.

Mitchell's organization was a sizeable gambling syndicate and during the four days immediately preceding its demise, which were apparently typical, it netted $8,200. as shown by accounting tapes introduced at the trial.

Mitchell's syndicate derived its huge profits from numerous customers who seldom bet more than one dollar and frequently as little as one cent. Each day the winning number was taken from the newspaper from certain digits in the published averages of stocks on the New York Stock Exchange. The bettors selected any numbers they desired to bet on from such sources as consultation with dream books, license plates, or from just thinking up a number.

Customers were served by some three hundred to five hundred free-lance employees in the Mitchell operation called "writers". The writers would inscribe the number being wagered on a tri-copy order book together with the writer's own code number. One copy was given to the customer, one retained by the writer and one turned over to the Mitchell syndicate.

The slips for the syndicate were turned over to messengers who delivered them to "pick-up-men" who took them to the count house where the winning slips would be separated and the day's expenses and new profit computed. The location of the count house was constantly being changed and it was known only to a very few people. At the count house all

receipts and expenditures were accounted for to the last penny. It was understood Mitchell trusted nobody and that he double-checked every recorded expense.

While Mitchell's gambling enterprise was efficiently run it had the glaring defect of being operated against the law and was therefore subject to arrests and harassment. If a policeman chose to watch one of its customer's places he could interfere with customers coming and going, could prevent the messengers or runners from picking up the slips, could stop the pick-up men from taking them to the count house, or do any number of things that would harass the gambling operator.

Whenever one of Mitchell's employees was arrested the syndicate would absorb the costs of the bail bondsman, the lawyer and the fine, if any. Mitchell's chief lieutenant, Van Wert Mullin, paid such bills and accounted for the same to Mitchell by making out accounting tapes for the amount thereof. Mullin also paid bribe payments in the same manner to numberous Indianapolis policemen. These payments were made regularly at the end of the police shift each month. Police captains and lieutenants received $30 per shift, and sergeants $20 per shift. Bribes were also paid to persons other than police officers and these payments ranged up to $1,500.00.

In approximately 1959 Mitchell first delegated the task of paying bribes to police officers to Mullin and he had been paying bribes to them since that time. On May 29, 1963, appellant was a police officer of the city of Indianapolis, was sergeant of a division, and assigned to Car 7 on the far north side of the city. His official duties included the duty to enforce the gambling laws of the state and also included conformity to standards of behaviour outlined in police department rule book, rule 22, providing no officer should leave his assigned district without permission from his commanding officer.

On May 28 and 29, 1963, appellant was working twelve hour shifts from 8:30 P.M. to 8:30 A.M. because of the increased workload attending the running of the Indianapolis 500 mile race. At 7:20 A.M. on May 29, 1963, appellant reported to headquarters he was leaving his patrol car to check a possible vice violation. At about the time of the so-called "vice check" Van Wert Mullin testified he received a phone call from appellant in which appellant told Mullin he would be dropping by. Shortly thereafter appellant drove into the alley behind Mullin's house in a police car wearing his uniform. Mullin gave appellant $40 and went back into his house. Mullin's residence at 2008 Loehn Street, Indianapolis, was an area outside appellant's assigned district.

Of the $40 which Mullin gave to appellant, $20 was to go to appellant and $20 to another police officer. In exchange for the $20 appellant was to avoid harassing Tuffy Mitchell, his agents, customers, and pick-up men. This was compensation for appellant's services on behalf of Mitchell's syndicate for a four week period.

Mullin and appellant first met back in 1960 at the Pink Poodle lounge owned by Tuffy Mitchell. There was evidence Mitchell was present and introduced the two men. Appellant went to the Pink Poodle on that occasion with another police officer and their wives for some barbecue. When the festivities at the Pink Poodle were over the group went to Van Wert Mullin's home where they partook of a case of whiskey.

Appellant admitted to "perhaps twelve or fifteen" conversations with Tuffy Mitchell prior to the Pink Poodle meeting in 1960 and that thereafter he had his conversations with Mullin. Appellant stated he had met with Mullin on more occasions than he could remember and attempted to explain the meetings with Mullin by saying they involved

conversations about athletics and current events and were for the purpose of cultivating Mullin as an "informer".

At the trial appellant claimed he had accomplished three misdemeanor arrests because of information he obtained from Mullin; but, when appellant testified before the grand jury shortly before he was indicted, he stated he made no arrests as a result of the information furnished by Mullin. Although appellant described the cultivation of informers as one of his standard police methods he admitted he never attempted to cultivate any informers with respect to the Mitchell syndicate. Appellant admitted being at Mullin's home between two and four times in the six months immediately prior to May 29, 1963.

On June 1, 1963, Mullin made a routine accounting of the week's expenditures to Tuffy Mitchell. The accounting included a tape record of the bribe transactions which had occurred the previous week. On June 2, 1963, the Intelligence Division of the Internal Revenue Service empowered with search warrants made a raid on Mitchell's home and found much gambling paraphernalia. While such officers of the Revenue Service were searching Mitchell they found in his wallet the accounting tape Mullin had given him the previous day. Upon this tape appeared appellant's name and that of other policemen and opposite each name the amount of money each person was allegedly paid.

Appellant by his own evidence had been able to make a large number of numbers arrests during the early years of his career which began in 1947, and prior to 1960 had subjected Van Wert Mullin to considerable harassment. But since that time there had been a great lull in appellant's anti-gambling activities. During the five months immediately prior to the raid on Mitchell's home appellant was on active duty in a high-crime neighborhood and made numerous other arrests but made no numbers arrests. However,

after being informed by Van Wert Mullin that his name was on on the accounting tape seized by the federal agents in their raid, appellant tended to his duties with new-found vigor, and during the three months immediately preceding his indictment he made five numbers arrests.

A natural deduction from this evidence was that appellant had something to offer in exchange for the money he was receiving from the Mitchell syndicate. His annual payments totalled approximately $240, and one arrest of a Mitchell employee could easily have accounted for an equivalent expense.

Appellant's counsel has argued that the evidence was insufficient to sustain the jury's verdict of guilty in that there was no proper, competent evidence as to the purpose of the purported payment of money to appellant. Mullin testified that in exchange for the $20 payment appellant was to avoid harassing Tuffy Mitchell, his agents, customers, and pick-up men. The evidence showed that the harassment prior to 1960 of the Mitchell syndicate by appellant subsided after that time, and this was the same period when by appellant's admission he began his associations and conversations with Mitchell's chief lieutenant, Mullin. We are unable to find supporting evidence that appellant did this to cultivate Mullin as an "informer", as appellant testified. On the contrary there is evidence sustaining the contrary inference that the payments were to reward appellant for overlooking law violations and for failing to harass and make arrests for the syndicate's huge numbers and gambling operation. The accounting tape was documentary proof of the payment of money to appellant and he has offered no evidence to disprove the purpose was a bribe. Certainly the jury had the right to draw an inference upon the foregoing evidence that the money was paid to appellant for an unlawful purpose. A conviction may be sustained on the basis of circumstantial evidence if there is some substantial

evidence of probative value from which a reasonable inference of guilt may be drawn.

Wagner v. State (1963), 243 Ind. 570, 575, 188 N.E. 2d 914, 917;

Weaver v. State (1963), 243 Ind. 560, 565, 187 N.E. 2d 485, 487;

McCoy et al, v. State (1958), 237 Ind. 654, 660, 148 N.E. 2d 190, 193.

We must conclude the evidence was sufficient to sustain the verdict and similarly was sufficient to authorize the court to overrule appellant's request for a peremptory instruction.

Appellant has further contended the court erred in overruling his motion to quash count two of the indictment.

Under Rule 1-3B of this Court appellant was required to file memorandum with his motion to quash stating specifically wherein the indictment was defective in relation to the statutory ground of the motion to quash relied on, and is deemed to have waived any ground not so specified in the memorandum.

Appellant's motion to quash count two of the indictment was predicated upon two grounds, viz: (1) That the facts stated in the indictment do not constitute a public offense and (2) That the indictment does not state the offense with sufficient certainty. However, the memorandum fails to comply with said rule by making any specific reference to either of the above statutory grounds of the motion relied on but simply argues generally as to the insufficiency of the indictment. This requirement of the rules is simple to comply with and enables the trial court intelligently to pass upon any particular objections to the indictment or

affidavit without waiting until an appeal is taken to ascertain what appellant's real objections to the charge, in actuality are. This expedites the early disposition of criminal cases and we are not inclined to nullify the beneficial purposes of such a rule by re-opening on appeal questions pertaining to motions to quash indictments or affidavits which appellant, who was represented by counsel, did not see fit to present to the trial court. Appellant has also failed to include the memorandum in support of his motion to quash, in the concise statement of the record in his brief contrary to Rule 2-17 (d) and 2-17 (f). We must conclude no question is before us as to the propriety of the court's overruling of the motion to quash.

Appellant also has contended the lower court erred in its ruling pertaining to the alibi statute when it refused to require the State of Indiana to make its answer to appellant's notice of alibi more specific as to the time of the alleged offense. The statutes governing the matter of alibi are set out in the footnote.[1]

---

1. "Whenever a defendant in a criminal case in a court other than that of a justice of the peace shall propose to offer in his defense evidence of alibi, the defendant shall, not less than ten (10) days before the trial of such cause, file and serve upon the prosecuting attorney in such cause a notice in writing of his intention to offer such defense. The notice shall include specific information in regard to the exact place at which the defendant claims to have been at the time stated in the indictment or affidavit as the time of such offense. The provisions of this statute shall not apply in case the court sets the trial for a date less than fourteen (14) days ahead." Burns' Sec. 9-1631 (1956 Repl.), Acts 1935, Ch. 228, Sec. 1, p.1198.

After the appellant filed notice of alibi in this case the State filed answer to such notice, in pertinent part as follows:

> "The time and date which the prosecution proposes to present at the trial of the above-entitled cause as the time and date when the defendant committed the offense charged was: Between 6:00 o'clock A.M. May 28, 1963, and 12:00 Noon of May 29, 1963."

Appellant filed motion to require the State to make the answer to the notice of alibi more specific, setting up that the statute required inter ali that the State set forth the exact date when the offense was alleged to have been committed but that the State's answer in stating the offense occurred between 6:00 A.M. on May 28, 1963, and 12:00 Noon on May 29, 1963, alleged two dates and encompassed a period of 30 hours. The court overruled appellant's motion to make specific.

---

1. (continued)

> "In the defendant's notice, as provided in the next preceding section, the defendant may also expressly require the prosecuting attorney to file and to serve upon the defendant or upon his counsel a specific statement in regard to the exact date which the prosecution proposes to present at the trial as the date when, and the exact place which the prosecution proposes to present at the trial as the place where, the defendant was alleged to have committed or to have participated in the offense. If the defendant's notice requires such statement by the prosecuting attorney, or if the prosecuting attorney proposes to present at the trial as the

Appellant then filed a second notice of defense of alibi under the statute setting forth appellant's whereabouts during the time and dates mentioned in the foregoing answer of the State.

Appellant also complains of the trial court's admission over his objection of evidence as to the commission of the offense during the 30 hours specified in the State's answer to the notice of alibi, which appellant states, was too broad a period to comply with the statute.

The State in reply has argued, that at the time the prosecuting attorney's statement in answer to the alibi notice was filed in August of 1964, its witness Van Wert Mullin, who was serving time in the Federal Prison at Terre Haute, Indiana, was refusing to talk to the attorneys for the State, and that more specific information than that provided was not available. It further appears that at the trial Van Wert Mullin testified the offense was committed on May 28 or May 29, in the year 1963, between 8:00 and 10:00 o'clock A.M.

---

1. (continued)

specific date when the defendant committed or participated in the offense a date other than the date stated in the defendant's notice, the prosecuting attorney shall file and serve such statement upon the defendant or upon his counsel not later than eight (8) days before the trial. If the prosecuting attorney's statement to the defendant names a specific date other than the date which is stated in the indictment or affidavit and in the defendant's notice, the defendant shall not later than four (4) days after the filing of the prosecuting attorney's statement file and serve upon the prosecuting

It is of course true, as appellant concedes, where time is not of the essence of the offense, under an allegation of a specific date, the offense may ordinarily be proved as having occurred at any date preceding the filing of the affidavit or indictment which is within the statute of limitations. This rule we have held yields to the limitations imposed by the alibi statute when such statute is invoked.

Evans v. State (1946), 224 Ind. 428, 433, 68 N.E. 2d 546, 548

Section 2 of the alibi statute, above cited, in substance provides the defendant may require the State to file a specific statement, in regard to the exact date (and the exact place) the prosecution proposes to prove such defendant committed the crime. The section following provides that at the trial if it appears the prosecuting attorney has failed to file and serve the prosecuting attorney's statement as prescribed herein, the court shall in

---

1. (continued)

attorney defendant's second notice presenting for such changed date the same details required for the original notice." Burns' Sec. 9-1632 (1956 Repl.), Acts 1935, Ch. 228, Sec. 2, p. 1198.

"In the event of the failure of the defendant to file and to serve the defendant's original notice, as prescribed herein or the defendant's second notice as prescribed herein, the court may in its discretion extend the time for filing the same. At the trial, if it appears that the defendant has failed to file and to serve upon the prosecuting attorney the defendant's original notice

the absence of a showing of good cause for such failure by the prosecuting attorney, exclude evidence by the prosecuting attorney that the defendant was at a place other than as stated in defendant's original notice and that the time was other than as stated in the defendant's original notice.

Appellant's motion to make more specific was general in form and did not allege an absence of good cause on part of the prosecuting attorney in failing to make a more definite statement. We are unable to see how the court's overruling of the motion was an abuse of discretion so as to constitute reversible error.

See:
2 Works' Ind. Pract., Lowe's Rev., Sec. 23.9, p. 115.

With regard to whether the court erred in admitting over appellant's objection the prosecuting attorney's evidence that the time was other than the time stated in defendant's original notice, we find appellant has waived

---

1. (continued)

of alibi as prescribed herein, the court shall, in the absence of a showing of good cause for such failure by the defendant, exclude evidence offered by the defendant to establish an alibi. At the trial, if it appears that the prosecuting attorney has failed to file and to serve upon the defendant or upon his counsel the prosecuting attorney's statement as prescribed herein, the court shall, in the absence of a showing of good cause for such failure by the posecuting attorney, exclude evidence offered by the prosecuting attorney, to show that the defendant was at a place other than the place

such question by failing properly to raise the same in the trial court.

In order to present a question of error in the admission of evidence over objection in the trial court, an appellant must set forth the question, his objection, the ruling of the court, and the answer of the witness.

Jay v. State (1965), ___ Ind. ___, ___, 206 N.E. 2d 128, 129;

Polson v. State (1965) ___ Ind. ___,)___, 207 N.E. 2d 638, 639;

Ray v. State (1954), 233 Ind. 495, 499 120 N.E. 2d 176, 178, 121 N.E. 2d 732;

F. W. & Hamilton, Ind. Trail & App. Pract., Sec. 1812, p. 388.

In his motion for new trial appellant has not set forth the answer of the witness and an examination of the record discloses that the question was not in fact answered. Subsequent questions and answers which appear in the trial

---

1. (continued)

stated in the defendant's original notice and that the time stated in the defendant's original notice. At the trial, if it appears that the defendant has failed to file and to serve upon the prosecuting attorney, the defendant's second notice as prescribed herein, the court shall, in the absence of a showing of good cause for such failure by the defendant to establish that he was at a place other than the place specified in the prosecuting attorney's statement, and that the time was other than the time stated in the prosecuting attorney's statement. Burns' Sec. 9-1633 (1956 Repl.), Acts 1935, Ch. 228, Sec. 3, p. 1198.

court's record without objection cannot properly be complained of for the first time in this Court.

Appellant has next contended the trial court erred in granting, three days before the trial, the State's motion to amend the indictment so as to change the date of the offense alleged from on or about May 31, 1963, to "* * * Between 6:00 A.M., May 28, 1963 and 12:00 Noon, May 29, 1963".

The applicable statute governing this matter is Burns' Sec. 9-1133 (1956 Repl.), Acts 1935, Ch. 189, Sec. 1, p. 928, which provides:

> "The court may at any time before, during or after the trial amend the indictment or affidavit in respect to any defect, imperfection or omission in form, provided no change is made in the name or identity of the defendant or defendants or of the crime sought to be charged."

Appellant has conceded in his brief that where time is not of the essence of the offense, an amendment of the indictment as to the time of the offense would be an amendment as to form only. However, appellant contends that time is of the essence of the offense when alibi is pleaded, citing:

Evans v. State (1946), supra. 244 Ind. 428.

The Evans case did not so hold however, but as heretofore indicated, after reiterating the rule that where time is not of the essence, any date prior to the filing of the indictment within the statute of limitations could be proved, simply stated such rule was subject to the limitations imposed by the alibi statute when invoked. We have heretofore pointed out why appellant's contentions concerning

his motion to make specific and his objections to questions asked involving the alibi statute where not meritorious. In the Evans case the prosecuting attorney's statement in reply to the prisoner's notice of alibi in fact was quite similar to that in the case at bar as the date was there fixed as being "* * * between 10 o'clock P.M. November 24, and 7 o'clock A.M. of November 25, * * *" This Court there in affirming the judgment of conviction, stated at p. 433 of 224 Ind., and p. 548 of 68 N.E. 2d:

> "* * * It was not necessary, as appellant seems to think, to amend the affidavit to show the offense as having occurred between those hours. * * *"

If an amendment to the affidavit was not necessary to specify the hours alleged in the alibi statement in the Evans case, we are unable to see how an amendment of the same nature, which happened to be allowed in the case at bar, could be considered material or harmful to appellant.

The next contention of appellant is that the court erred in admitting hearsay evidence from the witness Van Wert Mullin to prove an essential element of the offense, viz: that the purpose of the alleged payment of money to appellant was to influence him with respect to his official duty.

An examination of the record however discloses no objection by appellant on the ground of hearsay, the question and appellant's sole objection being as follows:

> Q. And what was the defendant to do during that period of time in exchange for this twenty dollars?
>
> "Again, I will object, Your Honor, the

witness has testified that anything that was made was made in connection with an agreement with Mitchell. We heard nothing about that, we don't know anything about what the agreement was, when it took place, what was said."

We cannot properly consider objections to the admission of evidence made for the first time on appeal. There must be finality sometime to the matter of making objections if litigation is ever to come to an end. An appeal in this Court is not a trial de novo but appellant and his counsel are limited to the objections addressed to the question in the trial court.

Appellant has further contended the court erred in admitting into evidence State's Exhibit 6, which was an accounting tape made by the witness Van Wert Mullin, and purported to be the record furnished Tuffy Mitchell of pay-offs to appellant and other policemen.

Appellant argues the exhibit was objectionable as hearsay since it was not made in the presence of the Appellant, while the State contends it was admissible within the shop-book exception to hearsay rule.

For documents to be admissible as business records within such exception, certain specific requirements must be met, viz: the entrant must make the entries within a reasonable time after the transaction, in the regular course of his business duty, have personal knowledge of the facts, and the record must be original.

State , ex rel., v. Central States Bridge Co. (1912), 49 Ind. App. 544, 549, 97 N.E. 803, 805;

Marks v. Box (1913), 54 Ind. App. 487, 500
103 N.E. 27, 32.

We prefer not to allude to the expression "res gestae" (found in some of the earlier decisions) in considering whether a business record is admissible under an exception to the hearsay rule. Such expression has become so spuriously enlarged in this area from the original "spontaneous exclamation" meaning originally attributed to it that any reference to it in determining the admissibility of business records is practically meaningless.[2]

Testimony in the record from Van Wert Mullin is to the effect that he gave Tuffy Mitchell an accounting tape of the bribe payments every fourth Saturday over a period of three or four years prior to and including May of 1963. Mullin further testified he made such an accounting and presented Mitchell with such a tape on June 1, 1963, which was the Saturday immediately following May 29, 1963, the day of the bribe payment in question.

---

2. Professor Wigmore speaks of the general confusion of res gestae in this area as follows (6 Wigmore, Evidence, Sec. 1757, p. 167 (3d Ed. 1940);

> "* * * Thus the phrase 'part of the "res gestae" came to be the shibboleth for admitting anything in the shape of words which could not be brought under one of the standard exceptions to the Hearsay rule. This loose usage was materially assisted, if not originally propagated, by a paragraph of Professor Greenleaf's (as well as by his indiscriminate use of "res gestae" for sundry kinds of hearsay evidence):
>
> "1842, Professor Simon Greenleaf, Evidence, Sec. 108: 'There are other declarations which

He further testified State's Exhibit 6 was the same accounting tape he presented to Mitchell on June 1, 1963. It thus was established the exhibit was nearly contemporaneous with and arising out of the transaction in question.

It is important that such evidence exclude the possibility of design or deliberation with respect to the exhibit. Had Mullin, a convicted felon, simply arrived in court with the exhibit on his person and presented it to corroborate his testimony, it obviously would have added nothing to such testimony. However, here it appeared the U.S. Internal Revenue Agent, Richard Bushman, testified he took the exhibit from Tuffy Mitchell's wallet while searching Mitchell pursuant to an arrest made on June 2, 1963, which was the day after Mullin had routinely turned the tape over to Mitchell. It thus appears that the witness Mullin had no opportunity to fabricate the exhibit unless he did so prior to Tuffy Mitchell's arrest. Any theory

---

2. (continued)

> are admitted as original evidence, being distinguished from hearsay by their connection with the principal fact under investigation. The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and in its turn becomes the prolific parent of others; and each, during its existence, has its inseparable attributes and its kindred facts, materially affecting its character, and essential to be known in order to a right understanding of its nature. These surrounding circumstances, constituting parts of the "res gestae", may always be shown to the jury along with the principal fact, and their

that Mullin and Mitchell anticipated or planned for their own arrest would be utterly ridiculous.

The exhibit meets all the foregoing requirements to establish its veracity as a shop-book entry entitling it to be admitted as an exception to the hearsay rule.

Appellant's contention the trial court erred in asking the witness certain questions relating to State's Exhibit 6 is waived by the failure of appellant or his counsel to object to such questions in the court below.

Similarly appellant's contention the court erred in permitting the witness to answer a question as to whether "appellant could have made any arrests" for the reason it called for a conclusion of the witness was waived by the failure to make such objection in the trial court.

Also, appellant's contentions as to the overruling of his objections to further questions asked of the witness

---

2. (continued)

> admissibility is determined by the Judge according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description.'

"This passage, and the structure of decisions resting on it, have no basis of principle.* * * "

Van Wert Mullin are waived in view of the failure of appellant to set out in his motion for new trial any answers given by the witness to such questions, in substance or otherwise.

See:
Jay v. State (1965), supra, and cases heretofore cited.

Judgment affirmed.

MYERS, ACHOR and ARTERBURN, JJ., concur;
JACKSON, J., not participating.

A P P E N D I X " B "

IN THE SUPREME COURT OF THE UNITED STATES

JACK HERMAN	)	
Petitioner,	)	
vs.	)	CAUSE NO.
STATE OF INDIANA	)	
Respondent	)	

Appellant's Petition For Rehearing was denied, without opinion, on October 19, 1965, by the Supreme Court of Indiana.